Regulate Credit Now, Reform it Later.

Building a robust & proportionate framework for the supervision of Buy Now, Pay Later

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About Coadec

The Coalition for a Digital Economy (Coadec) is an independent advocacy group that serves as the policy voice for Britain's technology-led startups and scaleups.

Coadec was founded in 2010 by Mike Butcher, Editor-at-Large of technology news publisher TechCrunch, and Jeff Lynn, Executive Chairman and Co-Founder of online investment platform Seedrs.

Coadec works across a broad range of policy areas that matter the most to startups and scaleups: Access to Talent, Access to Finance & Technology Regulation. We represent the startup community on the Government's Digital Economy Council, and the UK on the international organisation Allied for Startups Board.

Coadec has been at the forefront of the UK's Fintech policy conversations. We published our 'Blueprint for Open Finance' in November 2020 with the Chairs of the APPG for Fintech and APPG for Open Banking and, following this, the FCA has taken onboard a number of our key recommendations in their consultation on Secure Customer Authentication. Whilst the CMA is now exploring the governance structure of Open Finance.

Introduction

What do your gym membership and your T-shirt have in common? One has probably been getting more use than the other, but they could both have been purchased in reliance on the same exemption from the regulated consumer credit regime.

Generally, lenders providing credit to individuals have to be authorised by, and comply with the consumer credit rules of the Financial Conduct Authority (FCA). Certain types of consumer loans are exempt and are therefore not regulated by the FCA, however. An agreement will be exempt if it is entered into to fund a purchase under existing or contemplated arrangements between the party providing the credit and the supplier of the goods and it is structured as interest free and has to be paid in 12 or fewer instalments within 12 months of the agreement. This exemption for short-term interest free credit, also known as the exemption 'relating to the number of payments', is set out at Article 60F(2) of the Financial Services and Markets Act 2000 Order 2001 (FSMA).

Interest free 'buy now pay later' (BNPL) credit, where goods are paid for over a small number of instalments rather than paid in full at the point of purchase, rely on this exemption, although it was not originally intended for this widespread type of use in the retail sector. The exemption was intended for short-term invoice deferral but is also used by a range of non-financial firms offering interest free credit, such as dentists for repayment plans and gyms for membership fees.

So, if you bought your T-shirt online and at checkout clicked to pay using the interest-free BNPL method, and if you pay your annual gym membership on a monthly payment plan, it's very possible that both of these have been provided to you in reliance upon the Article 60F(2) exemption.

Why does this matter?

BNPL has become an increasingly popular payment option at e-commerce checkouts as more and more shopping has moved online because of pandemic-related lockdowns. Predominantly offered by relatively new brands such as Klarna, Clearpay and Laybuy, this option enables buyers to delay payment at no additional cost - typically for 30 days after purchase, or spread across installments from six weeks to three months.

Over 10 million people (one fifth of the UK's adult population) used BNPL to purchase goods online in 2020, with the payment method accounting for nearly 4% of online retail sales in 2020. Having barely existed five years ago, the UK's BNPL market almost quadrupled over the last twelve months (now valued at £2.7 billion) and it is predicted that by 2024 it will account for 10% of all British e-commerce transactions. This means that overall spending through these services in the UK will rise from £9.6 billion in 2020 to £26.4 billion in 2024.

Quite rightly, the boundless growth and success of this unregulated service has drawn the attention of regulators and policymakers alike. Earlier this year, the FCA publicised the findings of its independent review of change and innovation in the unsecured credit market – known as the Woolard Review - which recommended that the sector be brought under the FCA's purview. The government has already heeded this call, announcing imminent legislation to give the requisite powers to the FCA.

The Review recognised that while market innovations bring important benefits they can also create potential for consumer harm. So although in Woolard's own words that BNPL can be 'a cost-free way to access credit easily', it also offered some evidence of potential misuse.

For example, average single BNPL transactions are relatively low (£65-£75) but the rising popularity of BNPL products increases the potential for harm. Multiple purchases using different BNPL lenders are possible, facilitating accruals of around £1000 of debt, sometimes without affordability checks and without that debt being visible to credit reference agencies. This is a problem as the Review mentioned that 10% of a sample of BNPL users exceeded their overdrafts in the same month that they made a BNPL payment. Whether that is more or less than normal depends on the proportion of all consumers who exceeded their overdrafts, which the Review did not specify. While regulatory changes in mid-2020 to make overdrafts less costly may have affected behaviour during the period under study, the Review saw this as evidence that BNPL firms did not do enough to ensure they could afford their product. Importantly, there was evidence in 2020 to suggest that these regulatory changes may have had the perverse effect of increasing pre-arranged overdrafts, with every major lender introducing a 40% interest charge.

Unlike most regulated credit, it is retailers and not consumers who pay for BNPL in the form of a 2-3% charge on merchandise value. The Review cites a firm's pitch to retailers, apparently claiming that BNPL can 'increase their sales by up to 30%' compared to debit card sales. There could be several different drivers of this sales growth, such as higher demand from giving greater payment flexibility to those who can repay and from consumers who, without the option of BNPL, would spend their money elsewhere. The Review's concern is that a focus on sales might lead both retailers and BNPL firms to neglect affordability, potentially harming consumers' financial health.

It also found that consumers commonly mistake BNPL for a payment technology instead of a credit product. 40% of people who have used BNPL in the last year don't view it as 'proper' borrowing, and were unaware missed payments could affect their credit scores in the event that the BNPL provider shares this data. Conversely, many believe that it is subject to the same rules and protections as regulated credit, even though it falls outside the Financial Ombudsman Service's (FOS) compulsory or voluntary jurisdiction.

Without appropriate regulatory oversight, there is a real risk that the BNPL market could evolve in a way that is neither beneficial to consumers nor to the wider credit market. To prevent this, we strongly support the comments in the Woolard Review:

> "*To achieve a regulatory system which is more outcomes focused across the whole consumer journey, changes will be needed to both the Consumer Credit Act 1974 (CCA) and the FCA Handbook. Much of the groundwork for CCA reform has already been laid by the FCA's 2019 report. The FCA must engage with the Treasury to prioritise the work on CCA reform.*"

While another essay could be written on how the CCA is no longer fit for purpose, either from a consumer protection standpoint or as a barrier to new innovative products and services (which we will be releasing shortly!), we strongly believe that BNPL should be regulated as quickly as possible. The FCA must regulate the sector now before the Government sets out on a lengthy process of reforming the CCA later this year.

The Need for Speed

The vast majority of BNPL providers in our community welcome regulation and would like to see a regime implemented quickly and proportionately. Instead of incoming regulation being perceived as a source of uncertainty, it is actually seen as integral for the sector's future growth. Little wonder when you analyse BNPL against the products that it competes with, and the structural changes in consumer behaviour at hand.

Although the number of BNPL transactions is currently equivalent to just 1.6% of credit card card transactions, consumer preferences within the unsecured credit category are evolving. Not just in the UK but also globally.

In markets with similar levels of credit card penetration to the UK - like the US and Australia - there is a marked consumer shift away from traditional unsecured credit facilities such as credit cards. This was initially apparent in millennials (24-39 years old) and Gen Z (18-23 years old) but is now becoming increasingly evident across other generations as there's an increasing scepticism and resistance to revolving open credit lines and compound interest rates as well as late fees.

Some of these consumer shifts and preferences have accelerated significantly over the last 12 months given the current context but they were clearly evident prior to this. In September 2019, for example, the Reserve Bank of Australia reported active credit cards were at the lowest level since 2011, and by November 2019 credit card debt was at its lowest level since 2012. In January 2020 the Bank of England reported consumer credit balances continuing to decline and at that point predicted it to be at its lowest level since 2007 in the UK and the overall demand for credit cards was predicted to fall sharply. 93% of British millennials don't want a credit card and only 51% possess one. Simultaneously, there is a wider understanding amongst consumers that there are other alternatives open to them which are safe, convenient and more consumer friendly.

These shifts can be attributed to many factors, amongst which are a mistrust of traditional financial institutions borne out of experience of the 2008 financial crash and scandals such as PPI in the UK. Equally, there is a growing awareness that the business models of traditional providers rely on cross-subsidisation through interest and fees levied on consumers who build up unaffordable debt (and the consequences of carrying such debt) and the failure of financial institutions to keep up with evolving customer expectations - particularly for the digital post purchase experience.

It is clear from the ongoing drop in new issuance of credit cards and the increased use of debit cards that consumers are looking for flexibility and security but without the cost of traditional credit products or the increasing interest costs of current account overdrafts (which have doubled since March 2020 to on average 27%). BNPL solves this pain point, which explains its popularity. Consumers who have shunned credit cards use BNPL in a similar way: to smooth their cash flow across the month or a longer period without paying interest. By helping these consumers to avoid going overdrawn before they get paid, BNPL is growing into an important line of credit.

FCA regulation is therefore an opportunity for the sector to gain a permanent foothold in the market by strengthening perceptions that the product is healthy and subject to high standards. Trust is key to any new financial provider, and this will enable BNPL firms to market themselves as a more cost-effective and transparent alternative to credit cards.

It is important that the future regulatory framework is appropriately scoped to ensure that it recognises the different products and services, not just between advance pay schemes and BNPL, but also within the broader 'pay later' sector itself. As a fledgling industry, it is unsurprising that the market is far from uniform. There are a number of key differences between providers that can impact the risk to consumers:

- **Regulatory status** - Some providers are authorised to market regulated credit agreements, some hold more rigorous banking licences, whilst a small minority are not registered with the FCA at all.
- **Affordability tracking** - The more responsible providers carry out processes to track customer affordability (typically through "soft" credit checks and assessments of previous payment history) to determine whether a customer can pay for the purchase. Others do no checks at all.
- **Online vs. offline offering** - Some BNPL providers are looking to expand beyond their online offering, with virtual cards enabling transactions to take place in-store.
- **Payment schedules** – Some providers require payment weekly, every two weeks or monthly.
- **Late Fees** - Some providers charge late fees at certain intervals (e.g. 24 hours and seven-day).
- **Consumer protection policies** - relating to the quality of the product, right to return purchase or help available for unexpected financial hardship.
- **Complaints process** - Some providers have built in-house dispute mechanisms that act as a bridge to section 75 of the CCA, whereas others are found wanting.

Consumers must be clearly informed of any risks or fees that could be levied against their account at the point of purchase, not simply in the terms and conditions. In addition, consumer rights around areas such as complaints, vulnerability and hardship should be appropriately protected across all unsecured credit products.

...and Proportionality

Crucially, there is also a need to ensure that any proposed changes strike an appropriate balance that deliver good customer outcomes but also foster innovation to ensure that flexible payments and credit providers continue to evolve to meet consumer needs whilst putting consumers at the heart of their operating models.

Promoting alternatives to high-cost consumer credit has been a priority of both the FCA and HM Treasury over the last six years. Over three million consumers use high-cost credit in the UK (excluding overdrafts) and many of them have low credit scores, low incomes and cannot access mainstream forms of credit because they are trapped in the debt-cycle.

Much of the consumer credit business model is predicated on consumers not paying off their whole balance every month. By contrast, it is not in the interest of many BNPL providers to have consumers miss payments as they derive no revenue from it and incur the loss if a consumer is unable to repay since they take on all the risk rather than the retailer.

This means BNPL schemes have one obvious benefit over other credit products: if customers follow the rules, they can pay back purchases over the course of three or four months with 0% interest, meaning there is less potential to become expensive long-term debt. Capital Economics have estimated that if customers had used credit cards instead of BNPL for their purchases in 2020 they would have incurred around £76 million in interest fees. That's a pretty penny for a solution that only represents 1.6% of credit card transactions!

Now that a nascent competitor to high-cost credit has finally emerged, a knee-jerk response to some of the potential harms identified in the Woolard Review could be extremely damaging. Let's not throw the baby out with the bathwater. Given the divergence in operating models within the sector, it is vital that there is careful consideration as to how this can be achieved.

Simply extending the current perimeter of FCA's Consumer Credit sourcebook (CONC) and CCA applied to existing regulated credit products is not the long-term solution - rather there are aspects of the underlying framework and infrastructure that need to be updated to reflect the modern financial landscape and evolving consumer needs and protections in the digital age. This has the potential to then support the future of the sector and promote innovation and consumer choice through new forms of consumer credit and alternative payment methods.

Australia has no BNPL laws and no regulation, despite being home to some of the largest providers in the UK. It's still a wild west of consumer lending Down Under. However, the European Commission's proposed revision of the Consumer Credit Directive, published in June 2021, will introduce regulation, as will Canada. The USA will no doubt follow given political changes in Washington.

By setting a proportionate framework, the FCA can set the global standard and enable the UK to lead the way in financial services once again.

Five Priorities for BNPL Regulation.

Five Priorities for BNPL Regulation.

Following the Woolard Review, the FCA and government have committed to bringing BNPL products into the scope of regulation. The success of recent regulatory initiatives underlines the importance of greater choice and enhanced convenience for consumers.

These include Open Banking, the advent of Payment Services Directive 2 (PSD2), Strong Customer Authentication and the anticipated New Payments Architecture. New technologies and innovations continue to emerge, giving consumers greater choice in how they pay for things - whether that's smartphones, contactless cards, mobile wallets and mobile banking.

The regulation of innovative electronic payments — the plumbing of e-commerce — provides a case in point. PSD2 aims to facilitate the development of 'innovative, safe and easy-to-use digital payment services.' Regulatory flexibility has been key to unlocking this and serving innovation. It is based on co-regulation, industry expertise, and minimum prescription. This ensures that regulation is not restricted by rigid rules that fall short of keeping pace with innovation in technologically complex digital markets.

The FCA must continue this approach when contemplating regulation for the BNPL sector. A principles-based, outcomes-focussed framework will enable innovation to continue whilst providing absolute clarity on the desired outcome for consumers.

Following extensive consultation with British BNPL providers, e-commerce startups and challenger credit bureaus within our community, we suggest regulation should focus on 5 themes:

1. **Zero-in on regulating innovative credit providers, not retailers.**
2. **Require providers to develop processes to track affordability.**
3. **Drag the credit rating industry into the 21st Century.**
4. **Tighten consumer communications.**
5. **Provide a better customer redress model.**

1. Zero-in on Providers, not Retailers.

Retail is a strategically important sector of the UK's economy; it is the largest sector for employment, with over 3 million jobs and generates £447 billion in turnover – equivalent to one fifth of UK GDP – and it plays a vital role in the regeneration of towns, cities and local communities. But it will be a very different consumer who emerges onto the high street this spring.

The global pandemic has destabilised the economy, and changes in consumer purchasing behaviour reflect changing market dynamics. These changes could be temporary or permanent. The most common temporary changes are reduced spending and shifts in priorities: consumers spend less and prioritise essential products (e.g. hygiene, cleaning) over non-essential ones (e.g. apparel, electronics). The shift to online shopping is different. Consumers, locked down in their homes, have turned digital.

Online shopping leapt from 20% to 30% of overall retail sales and monthly credit card lending fell by 47% from £18 billion in February last year to a low of £10 billion in April. The new demand for omnichannel digital shopping across online platforms, including online stores and offers on social media, signals a permanent change in consumer behaviour.

A desire for seamless payment transactions in their online purchasing experience has also accompanied this change, and BNPL satisfies that expectation perfectly. Already prior to the pandemic, consumers were increasingly demanding faster, cheaper, more convenient, and more secure payments. With the lockdowns, more consumers from more diverse age groups became accustomed to online shopping. In the UK, it is predominantly Millennials and Generation Z shoppers who 'embrace digital shopping for its double benefits of convenience and safety'. For these consumers, they expect brands and businesses to keep up with the way they order, receive, and pay for goods, services, and content. In the 'Now Economy', providing service with a sense of immediacy is no longer a preference - it's essential.

To survive and remain competitive in these especially challenging times, retailers have been forced to not only adapt to the pandemic-induced restrictions, but also to wider behavioural changes. BNPL sits at the top of a retailer's payment tech stack alongside digital and mobile wallets such as Apple Pay, Google Pay, and PayPal, and a reported 9.5 million people in the UK avoided buying from retailers that didn't offer BNPL options last year. It is now a vital part of the convenience of online purchasing and it is set to experience double-digit growth over the next few years. Combined, BNPL (10%) and mobile wallets (40%) will account for half of all online payments in the UK by 2024.

All of this is important in the context of who will take responsibility for credit checks and whether retailers will need to be authorised for credit broking once formal regulation is rolled out. Woolard was pretty adamant that retailers should either be authorised for credit broking under Article 36A(1)(a) of the RAO, or that they should become the 'Appointed Representative' of a BNPL firm. But the (un)intended consequences of this move would be extremely damaging to e-commerce startups and SME retailers at a time when their bottom-lines have been hit hardest, and it would create an uneven playing field between different credit products.

It would distort the online retail market by disproportionately increasing administrative and compliance costs for e-commerce startups and SMEs. Major retail brands have the scale and capacity to take on additional regulatory burdens required for credit broking licenses, and many already offer regulated credit (store cards, credit agreements etc.). But according to estimates, this accounts for less than 10% of all merchants that utilise BNPL solutions, and there are over 18,000 merchants that would need to apply for a broker licence.

Even though it would probably be more likely for retailers to pursue 'Appointed Representative' status, due to the low-risk nature of the credit broking activities carried out through BNPL offerings (i.e. the broking is a secondary activity to help finance the purchase of goods and services), there are still several burdensome aspects of the FCA's authorisation regime that similarly apply to firms seeking limited permissions. Even 'just' an Appointed Representative Status precipitates additional, potentially substantial, costs, whether that's the reporting obligations, complaints recording or compliance with the Senior Managers & Certification Regime.

As a result, a large proportion (68%) of e-commerce startups in our community have already told us that they would stop offering BNPL solutions if additional compliance burdens were required. 86% said that this would put them at a commercial disadvantage to larger players, as it would prevent them from being able to offer a customer experience that is increasingly in demand. After all, a reported 9.5 million people in the UK avoided buying from retailers that didn't offer BNPL options last year, and 70% said that BNPL was either 'fairly important' or 'very important' when deciding to use less well-known sellers.

Worryingly, Woolard actually encourages this anti-competitive outcome:

> *"We could also expect some retailers to not want the responsibility of being authorised and to withdraw from the market – this is likely to be a positive measure that improves consumer protection"*

Forcing smaller retailers out of the market is certainly one way of doing this... But whether it is fair and reasonable for a regulator to actively seek to entrench the market dominance of larger retailers by constructing a regulatory moat in their favour is an entirely different matter.

This would not only be extremely damaging to the many e-commerce startups in our community, but the impact will also be felt by consumers who will have limited choice at checkout. Since merchants wouldn't be required to hold licenses for offering other payment solutions like credit cards and Paypal, it would create an uneven playing field and put BNPL at a commercial disadvantage. In effect consumers could be pushed back onto less desirable, higher cost credit alternatives, including traditional credit cards.

This is extremely important because British startups, like Zilch and Curve, are at the forefront of expanding BNPL solutions beyond the online world. Zilch's over-the-top BNPL product will allow customers to shop wherever Mastercard is accepted and spread their payment over 6 weeks for zero interest and zero fees. Unlike traditional BNPL products that require technical integration with merchants, Zilch's model does not require any integration and their virtual card will instantly provide customers with accessibility everywhere. If merchants were required to obtain credit broking licenses to provide BNPL products, either online or in-store, then why wouldn't they need the same authorisation when offering credit cards?

Nevertheless, it makes little sense to try and map the in-store experience onto the online experience. The two are totally different. Credit broking licenses might make sense in the context of more traditional point-of-sale finance, where the staff of bricks-and-mortar retailers are the main protagonists in both offering and negotiating the credit terms offered to potential borrowers. But retailers play a much more limited role in presenting and negotiating BNPL terms, which on the whole is relegated to merely integrating with BNPL solution providers via Application Programming Interfaces (APIs) and displaying the BNPL offers in their checkout pages, it is disproportionate to suggest that they should be deemed to be credit brokers.

Making retailers obtain credit broking licenses responsible for pre-contractual information would be highly inefficient for both retailers and the FCA alike. The regulator would have to supervise 30% more merchants from day one than it does currently, and as the BNPL market grows, so too would the number of merchants the FCA needs to regulate. At the end of the day it is the BNPL providers themselves who are in a better position to bear this responsibility by creating user interfaces that are both consumer-protective and fully embeddable in online retailers' marketplaces.

2. Require Providers to Develop Processes to Track Affordability.

When used responsibly BNPL is an extremely powerful product for consumers. It can smooth cash flow across the month or a longer period without incurring interest, and it can help to avoid going overdrawn before they get paid. 64% of adults that have previously used a BNPL service thought it had helped them manage their finances 'a lot' or 'a little'. But there is also evidence that suggests a minority of consumers (25%) regretted using these products as it encouraged them to spend more than they can afford. The result for these people can be difficulty budgeting, late fees and spiraling debts.

The government's legislative changes will expand FCA oversight to the most popular BNPL products that provide the bulk of their revenue. For those products, regulation will likely start by bringing BNPL products under the CONC, including the requirements to track the credit worthiness of customers, including affordability. While the FCA views both measures as part of the same assessment, affordability in practice means a higher threshold for approval, as lenders must take reasonable steps to ensure borrowers can repay in a sustainable manner, that is, without facing financial difficulties or adverse consequences.

As it stands, the vast majority of BNPL providers complete a basic credit assessment by using a mixture of "soft" credit searches and previous payment history. Importantly, the lack of regulation today means that this step is inconsistent between providers. A "soft" credit check uses less data from a Credit Rating Agency (CRA) and the check is not registered, meaning that it is possible for consumers to make multiple purchases using different BNPL lenders, facilitating accruals of around £1000 of debt. It's not guaranteed that this will be picked up by other BNPL providers' affordability checks and the debt remains invisible to credit reference agencies and other credit providers. It has also been argued that this focuses more on credit risk, rather than affordability.

It is certainly true that some providers use riskier approaches like lending small amounts to every first applicant without any form of credit search, "soft" check or affordability test in order to evaluate the applicant's willingness and capability to repay. We would strongly urge these practices to be discontinued and the application of the CONC should lead to more robust processes.

Ideally, BNPL startups would love to be able to share more data with CRAs and see all of a customer's financial commitments in one place - be they ongoing lines of credit and liabilities, other BNPL commitments, or even short-term invoice deferrals like gym memberships and dental repayment plans. This would not only help BNPL providers to perform better affordability assessments, but it would also enable the wider credit industry to gain a better picture of a consumer's financial health and ability to repay in general. Since repayments would also be registered, it would also enable providers to improve the credit histories of the 10 million individuals who used their services last year. This would help to transition them to other cheaper forms of credit. However, the CRAs themselves are the roadblock to achieving this nirvana.

Due to legacy technology issues the CRAs have been unable or unwilling (sometimes both) to provide the necessary infrastructure for high-frequency, low-value, low-risk credit products (we'll delve deeper into this in the next section). For example, we are still waiting several years for credible data on the rental market to improve assessments of expenditure. Challenger credit bureaus have shown that this can be done, but it is not in the commercial interests of the three big CRAs to innovate and ensure that their products move with the pace of the market.

Currently, the only way a BNPL provider can register a customer's commitments with a CRA is through a "hard" credit search. But this approach is entirely disproportionate to product risk. On average, consumers use BNPL products about five times a year with a mean transaction value of £65-£75. Imagine being dinged by the credit bureaus five times a year for a modest total of £325! The detrimental impact that this would have on consumers' credit scores and financial inclusion in general cannot be overstated.

Not only is it a time consuming and intrusive exercise, but having several "hard" searches carried out in quick succession would appear to lenders that a consumer is desperate for credit, or that they're suddenly struggling with their current debt. When in reality they're just looking to purchase a new summer dress. It would also increase their likelihood of either being rejected for credit completely, or only offered credit at a higher interest rate. This doesn't sound like an ideal outcome.

Figures from market leaders - Klarna, Clearpay, Laybuy, Openpay and Zip - suggest that default rates range from 1-5%, which compares somewhat favorably to 6.4% defaults on credit cards payments. Whilst the FCA is correct in asserting that affordability assessments for BNPL should be robust, it would be wrong to focus on the possible but uncertain benefits of mandating "hard" credit searches to the 1-5% who default, but not on the certain costs to the 95-99% who do not. A cost-benefit analysis needs to consider this, but it would appear to be an entirely disproportionate cost to the overwhelming majority of consumers if hard credit searches were mandated.

We only need to look at the lessons learned from Australia to understand the consequences of a prescriptive approach to affordability. The Australian Securities and Investment Commission (ASIC) has practically ruled out online lending by setting an overly rigid set of rules governing the minimum documentation that online lenders need to revise in the course of their affordability assessments.

While the end-goal is a credit system that is 100% transparent and accommodates high-frequency and low-value credit products in a proportionate manner, it is clear that a number of reforms will need to take place before this can be achieved. And due to the CRA's current lack of infrastructure, it will be vital that the FCA implements a technology neutral and outcomes-based approach to affordability assessments.

This will provide absolute clarity on the desired outcome for consumers whilst allowing innovation to continue to take place. In the short term, this approach is not incompatible with applying the CONC and to illustrate the diversity of approaches that can be taken to track affordability consummate to risk exposure, please see the table below:

Affordability Tracking Technique	Details
Open Banking	The customer consents to share financial information from a bank account. A third party analyses data to determine affordability through measures such as calculating income and expenditure and analysing existing liabilities through transaction information
Outsourced: Exposure Limited to Defined Credit Limit	The full cost of a transaction is limited to a predefined limit. The BNPL firm logs the full transaction amount as an authorization request on a valid credit card, meaning the transaction amount cannot exceed the credit limit determined by the credit card provider. Failure to pay will trigger the remaining balance to be taken from the credit card.
Hard Credit Check	Request sent to one of the big three CRAs for customer credit record. Request is logged for future reference.

Desired Consumer Outcome	Current Problem	Outcomes-Focussed Solution
Consumers are granted lines of credit that are sustainable, in order to avoid unsustainable levels of debt. Whilst affordability assessments are proportionate to the value, length of term and cost of the loan.	Although 64% of BNPL users have said that they thought it had helped them manage their finances 'a lot' or 'a little', there is also evidence that suggests a minority of consumers regretted using these products as it caused them to experience late fees and spiraling debts. Whilst it is vital that affordability assessments for BNPL are robust, it would be wrong to focus on the possible but uncertain benefits of mandating "hard" credit searches to the 1-5% who default, but not on the certain costs to the 95-99% who do not. Due to the CRA's current lack of infrastructure, it will be vital that the FCA implements a technology neutral and outcomes-based approach to affordability assessments. This will provide absolute clarity on the desired outcome for consumers whilst allowing innovation to continue to take place.	Mandate annual/quarterly reporting on metrics that display the sustainability of providers' loan book and lending practices. The FCA must consult with industry on what the 'acceptable' parameters should be for some of the following: ● % of missed payments; ● % of customers under forbearance measures; ● % of customers referred to Debt Collection Agencies (DCAs); ● Annual Default Rate. This reporting criteria alone will force BNPL providers to peg their default rates to a certain % - stamping out aggressive lending practices and promoting a more responsible approach. It will also place greater emphasis on the need for retrospective analysis of consumers in arrears, under forbearance or whose loans have been referred to DCAs. As a result, internal affordability assessments will become more robust, and firms will be encouraged to carry out creditworthiness assessments when increasing credit limits. With sanctions for repeated poor performers on the above metrics, a proportionate balance will be struck between consumer protection, access to credit, and innovation. It is important that reporting for the Annual Default Rate is calculated against Gross Merchandise Value (GMV) - i.e. the value of the products BNPL transactions enable. Since the duration of terms primarily ranges between 30 days and 90 days, BNPL books can be turned over more than 10 times a year compared to two times for traditional banks.
Limiting the risk of consumer indebtedness through late fees and interest charges.	Approaches to late fees should be consistent since some providers cap fees (either as a value or a percentage of the balance), whereas others do not. But careful and complex analysis is vital to understand the impact of any pricing intervention on consumers who may lose access as a result. Looking to set a price cap across the whole of consumer credit, which some European nations do, would present significant challenges to assessing the impact on access. To apply across all credit without having a major impact on access, it would need to be set so high as to have little impact on most products.	The FCA should consult with industry on how it can introduce product-specific price caps for BNPL. Different credit products should have different pricing caps. It seems obvious to say, but subprime and near-prime credit should not be subject to the same caps.

3. Drag the Credit Rating Industry into the 21st Century.

Our credit system is struggling to adapt to the changing needs of consumers and fintech providers. The three big traditional CRAs in the UK - Experian, TransUnion and Equifax - calculate creditworthiness based on past borrowing history and a few other simple measures such as being on the electoral roll and frequency of credit applications. These are a very weak signal of financial health as they don't consider an individual's day-to-day income and expenditure.

As it stands, creditworthiness is a blackbox and based on very primitive assumptions about a person's financial health. The COVID payment holidays have introduced yet another layer of opacity. Our (very conservative) estimate is that at least 350,000 new loans have been made to people in receipt of a payment holiday - it's clear that a new approach to transparency in credit is needed. Even Woolard acknowledged the difficulties that CRAs and lenders experienced while trying to comply with temporary COVID-19 forbearance rules:

> *"[CRAs] were unable to quickly provide a consistent approach to reporting short-term forbearance that has no long-term negative impact on credit files. This raises wider questions about the ability of the credit information market to operate at pace and deliver change in the interests of firms and consumers."*

Challenger credit bureaus in our community - like Aire, Credit Kudos and Credit Ladder - have shown that this can be achieved. By utilising Open Banking data, they have been able to provide creditworthiness and affordability solutions based on intelligent transaction analysis, and offer an alternative data source that provides more accurate assessments of people's current circumstances. They have shown a route towards a more meaningful conversation with prospective borrowers on affordability.

Further still, both Aire and Credit Kudos have developed solutions that enable a consumer's BNPL obligations to be visible to other lenders, without the need for a "hard" search to take place, and enables them to build their credit scores through proven repayment history.

But the three big CRAs have been unable or unwilling to innovate in a similar fashion because it is not in their commercial interest to do so: They derive income from financial institutions carrying out "hard" credit searches; as well as receiving commission from sales, referrals and applications for credit cards and loans. The oligopolistic nature of the market has encouraged them to hoard consumer data, and discourages them from sharing it with other firms in the space. Like a sleepy dragon they have guarded their treasure trove of data for too long, and it must be prized open for others to promote greater competition and innovation. This is our only hope if the FCA wants to successfully deliver a regulatory framework for BNPL at pace.

If anyone owns this data it must be the customer and not the sleepy dragon, so it should be put to work for their interests. Other jurisdictions have realised this and have acted to break this oligopoly and rectify the legacy issues we see in the UK. Whether that has been through the establishment of National Credit Bureaus (e.g. Ireland and Poland), moves towards one (e.g. United States), or through regulations that require financial institutions to share data with all credit bureaus and not just the incumbents (e.g. many jurisdictions across Asia).

Thankfully the UK Government is currently drafting legislation that will provide the legal framework for greater data sharing in the credit space. The Department for Business, Energy & Industrial Strategy (BEIS) is due to lay its Smart Data Legislation before parliament in Q1 2022. This will go beyond Open Banking and establish a consumer data right that will mandate institutions to share data in real-time to third parties, with the consumer's explicit consent. The advent of Smart Data will not only realise true Data Portability for consumers, but promote even more innovation in consumer credit profiling, particularly benefiting those with thin-file credit histories.

In the meantime, a fundamental root and branch reform of the CRA industry's opaque governance and outdated infrastructure must be carried out by the FCA. We wholly support Woolard's conclusion that:

> *"The FCA, working with the Steering Committee on Reciprocity (SCOR),* ***lenders and consumer groups****, needs to:*
>
> - *consider whether the current governance arrangements deliver good outcomes and to implement new arrangements if not*
> - *identify areas where legacy infrastructure is creating barriers to change and innovation in the credit information market and set out a timeline for improving or updating systems.*

The Steering Committee on Reciprocity (SCOR) is an opaque body that controls the standards on how credit information is submitted and shared. Most of its principles and guidance dates back to 2000, even though technology, innovation, data science and legislation have drastically changed. Participants in the credit reference industry and those that share data with it have also changed, including fintech challengers.

Where new guidance and standards have been issued, it has been developed in smoke-filled rooms, with little regulatory oversight and under the authority of a small cabal of vested interests. Membership of SCOR is limited to the incumbent credit reference agencies - Experian, Equifax and TransUnion - and only a handful of trade associations like UK Finance and the Consumer Credit Association UK (CCA). No wonder the oligopoly has persisted at the expense of innovation over the last 21 years...

For example, when assessing credit risk, the industry uses traditional credit history data in accordance with the Principles of Reciprocity subject to the oversight of SCOR since its inception. To get an indication of affordability, the industry uses Current Account Turnover (CATO) data, yet SCOR's members have implemented restrictions around its use which have limited what most lenders and challenger credit bureaus are able to access and see.

The governance needs to be updated and the industry needs to become more transparent. That starts with radically diversifying the membership of SCOR to include: consumers and consumer groups, challenger credit bureaus, BNPL providers, alternative lenders and representatives from startup and fintech associations (e.g. Coadec, Innovate Finance and the Association of Alternative Business Finance).

Similarly, the legal framework should apply to all data shared across the entire industry, including all data that may be used to assess credit risk and affordability, and take into account AI and machine learning systems that may be used in making credit decisions.

Opening up data assets like CATO data to the financial market would be in the consumer's interest. It would help them work out their own affordability status and help lenders assess affordability more effectively and proportionately. Consumers could also make more informed decisions about which credit products to choose and lenders could offer them products better suited to their financial status rather than relying on estimates of income and spending. It would provide the industry as a whole with a more accurate source for financial forecasting and economic data, making affordability checks more efficient and accurate.

It is vital that the FCA takes the reins and sets a clear roadmap for infrastructure overhaul and enhanced data sharing. SCOR has proven to be an inadequate forum for ensuring that the CRA's products move with the pace of the market. Without greater competition, the FCA's attempt to regulate BNPL at pace will be hamstrung. Unless there is a fundamental restructuring of its membership and operating model, HM Treasury and the FCA will need to intervene directly.

4. Tighten Consumer Communications.

Bringing BNPL into the purview of the FCA will require firms to be authorised and comply with the FCA's Principles for Business and the Senior Managers Regime. This includes ensuring that they "must pay due regard to the information needs of [their] clients, and communicate information to them in a way which is clear, fair and not misleading." Since many of the more established firms already offer some regulated products, this 'fixed cost' of regulation will be less steep than for firms that are completely outside the perimeter.

But there are a number of concerns around how BNPL products are marketed and presented:

1. **Whether providers clearly communicate that it is a "credit" product and the consequences that missed payments may have on credit scores, or the fees that may be incurred**. According to research, two-fifths (41%) of consumers are unaware that BNPL schemes could impact their credit score. It's clear that more needs to be done here.
2. **Whether providers adequately consider the impact of their advertising on consumers and ensure it doesn't encourage inappropriate use of credit.** A number of providers were reprimanded by the Advertising Standards Authority (ASA) last year, but this is also a problem for the wider fintech sector.
3. **Whether BNPL options are presented correctly and transparently at checkout**. In some instances, BNPL offers are presented as a default payment method or in a long-list of indistinguishable options.

It is vital that consumers receive clear, concise and easy-to-understand information both at the pre-contractual stage and during the lifetime of the credit agreement. The current regime focuses on prescribed compliance with technical requirements. Despite significant information being set out in SIs, this is enhanced further by FCA Handbook Rules. This leads to duplication in several documents that are provided to customers and adds to the length of information being provided. In a recent survey of 1,000 UK consumers conducted by a leading BNPL firm, 26% of credit card holders didn't know the APR on their credit card demonstrating that dense T&Cs are not working today.

Simply pushing consumers towards more dense legalese text is not the answer. Let's all just admit it, T&Cs are long and the vast majority of people don't take the time to read through every page. The cumbersome standard pre-contractual information does not work well in digital delivery channels and it repeats information found in agreements. We can do so much better than this!

The FCA must contemplate how it can increase consumer visibility of credit products in an agnostic manner in order to maintain a level playing field between credit products and the different channels through which they are used. Although it is rightly troubling that two-fifths (41%) of consumers are unaware that BNPL schemes could impact their credit score, it would be wrong to solely focus on this sector alone.

What about, for example, consumers who are linking their credit card to an Apple Pay or Google Pay wallet? 32% of all UK e-commerce transactions in 2020 took place through digital wallets, which is significantly higher than the 5% that took place through BNPL providers, and credit cards accounted for over half of these digital wallet transactions. Yet there is no friction for purchases on credit cards, and the vast majority of consumers are unaware of their credit limit let alone the APR or late fees. And while only 9% of adults have missed a BNPL repayment in the past 12 months, nearly four in ten (39%) missed more than one credit card payment over the same time period.

If additional risk warnings and improved visibility of T&Cs were proven to help consumers, then they should be applied across the board. Otherwise, alternative higher-cost forms of credit could exploit new payment methods and, through regulatory arbitrage, lure customers away from lower-cost credit by utilising the more convenient channels of payment that they crave. This would be the opposite of what the FCA is hoping to achieve.

A much better outcome for consumers and merchants would be achieved if the FCA worked collaboratively with BNPL and other payment providers towards a solution that doesn't just force T&Cs as the cure-all, or at least promotes guidance on more understandable, customer friendly T&Cs. Since BNPL transactions are on the whole low-value and low risk (average value of £65-£75), the level of friction must be proportionate. It may well be that depending on the size of the transaction - say, £100 - additional friction and warnings would be beneficial for consumers, and it would mirror the Secure Customer Authentication (SCA) requirements for contactless payments. But this would be discovered best by working collaboratively. This would likely entail targeted focus-groups, and consumer-facing testing, with those who are misusing products so that appropriate research can be carried out and the potential solutions identified. Following this discovery exercise, the FCA could then create a single set of simple Rules in their Handbook, where lenders would find all the information they need to comply, assisting new market entrants. This would remove duplication and make all information consistent in its approach. It should be made channel neutral enabling firms to innovate in highlighting customer information, for example, presenting online applicants with links to further information.

BNPL providers are masters of great checkout experiences. Putting up barriers in user experience that may marginally decrease conversion or sales but really help a consumer understand the choice they're making is something that British fintechs have become world leaders at. Crowdfunding platform Seedrs, for example, makes individuals take a short quiz before they become an investor. We should allow fintechs to do the same again, since the benefits on the wider lending sector could be revolutionary.

Lastly there are a number of refinements that need to be made to the FCA, ASA, Committee of Advertising Practice's (CAP) guidance for financial services advertising and marketing. The pandemic has fundamentally changed advertising forever, but the guidance has yet to catch up. Brands have moved away from the more traditional methods of advertising such as outdoor and events, instead they are now looking to bring their messages directly into peoples homes using social media. With the rise in time spent on social media came a rise in people turning to social channels for financial guidance.

The boom in 'fin-fluencer' campaigns on Instagram and TikTok has extended across the entire fintech sector and has been used by the likes of Revolut, Monzo, Plum, Habito, Klarna and, most notoriously... Lanistar. Considering that 30% of adults who have seen an influencer or celebrity give financial guidance have acted upon it there is a lot of uncertainty around what messages should be promoted, and questions around whether consumers understand when they are seeing adverts promoted by influencers. Here, industry is leading the way by establishing standards and guidelines about what is acceptable and what is not. The FCA and ASA should lean on this very important work.

Desired Consumer Outcome	**Current Problem**	**Outcomes-Focussed Solution**
Consumers are given clear and fair information, which makes clear that they are taking out a credit product, and provides details of the associated risks from missed payments. **This includes easy-to-understand information both at the pre-contractual stage and during the lifetime of the credit agreement.**	According to research, two-fifths (41%) of consumers are unaware that BNPL schemes could impact their credit score. It's clear that more needs to be done here.	The FCA should mandate the reporting of data that indicates whether BNPL customers have been given adequate information at the point of sale (Both from the providers and merchants alike): • **Consumer complaint volumes** - This will show whether consumers have been given a clear understanding of the product at the point of sale. • **No. of complaints upheld by ASA in a year** - This will show whether merchants are presenting products correctly. With sanctions for repeated poor performers on the above metrics, this will strike a balance between consumer protection and innovation towards a solution that doesn't just force T&Cs as the cure-all.

5. Provide a Better Model for Consumer Redress.

Consumers must have the right to redress, but for a modern regime to function effectively it must be proportionate to harm caused to the borrower. It is obvious that an alternative dispute mechanism for consumers outside of the court system is necessary, to respect access to justice under the rule of law, both as a matter of principle and in the interests of the good functioning of the market. Imbalances of power and funding make it infeasible for consumers to bring claims against large financial service providers in the courts. The cost of pursuing a claim and risk of being liable for the firm's costs if unsuccessful, and the relatively small value of claims, would mean even the strongest of claims would go unfought.

But it is less obvious that the current construct of the FOS is the best way of providing this for BNPL products, and there are clear signs that the way the FOS operates has in some cases introduced unfairness and uncertainty for firms (especially small and mid-market providers). It is no secret that many startups in the non-bank lending sector already struggle with the FOS and its approach to handling affordability complaints, and anti-competitive effects have been evidenced most prominently in the lending and advice markets.

While another essay could be written on the impact of interpretation and then re-interpretation of affordability principles, the most pressing issue is the cost of case fees relative to the product risk of BNPL. Irrespective of whether they win or lose, lenders are currently forced to pay £650 per case (soon to be £750) after the 25th complaint. Yet, the average BNPL transaction is a tenth of that fee (£65-£75). The FOS' current remit cannot be expanded to include BNPL products without addressing the disproportionate costs per complaint.

So what's gone wrong?

Under FSMA, the FCA has a statutory objective of protecting consumers. But it also has an objective of 'promoting effective competition in the interests of consumers in the markets for... regulated financial services'. Its interface with the FOS should therefore have regard to maximising competition in the consumer and SME financial services markets.

In its 2019/2020 annual report, the FOS described its impact on 'preventing detriment'; the Chief Ombudsman wrote of the FOS 'playing its part in preventing detriment' and 'telling banks to step up to help victims of fraud'. It could be argued that both of these activities ('preventing detriment' and 'telling' banks what to do, beyond adhering to determinations of complaints) exceed the statutory remit of the FOS.

Preventing detriment is not the same as fairly resolving complaints. A consumer could suffer detriment without any unfairness or breach of substantive rules. The fact that FOS places such emphasis on prevention of detriment, rather than fair and lawful treatment of consumers, risks unbalancing its outlook and potentially undermines the principle of freedom of contract.

A typical case study describes a consumer complaining that they were charged £2,000 for exceeding the maximum mileage under a car finance agreement. Even though the mileage limit was clearly stated in the contract, and there was no suggestion that the contract was obscurely worded or misleading, the complaint was upheld on the grounds that the credit broker had not actively brought it to the consumer's attention and her prior credit agreements had not included such a term. This seems likely to undermine the ability of a business to rely on its binding terms of business in matters where the FOS has jurisdiction. It also risks disincentivising consumers from reading and considering the terms they are entering into, when it is known that any undesirable terms that are subsequently discovered will be overturned. The imbalance against consumers that prevails in the legal system more generally is reversed here, and the objectives of the FCA to protect consumers are not balanced by an equivalent objective of fairness for firms.

While this may favour those consumers who successfully complain to the FOS, it surely disadvantages consumers at large if firms end up charging more, innovating less and serving a narrower, lower-risk market as a result of the lack of legal certainty. As the FCA's competition objective specifically refers to innovation and the ease with which new entrants can enter the market, this should be of concern to it. Rules on complaints handling are so prescriptive that there is little incentive or opportunity for firms to distinguish themselves and compete on customer service.

It is also at odds with the principles of good regulation under FSMA, which include the general principle 'that consumers should take responsibility for their decisions' and refer to risk levels associated with certain financial products, clearly acknowledging that the objective is not to eliminate risk. Consumers can only be protected from detriment if all risk of a product not meeting their needs or expectations rests on the firm, thus removing responsibility from the consumer, in contravention of FSMA. The recent emphasis on prevention of detriment is not only in danger of taking the FOS outside of its statutory remit; it threatens the fairness and reasonableness of the process as a whole.

The relationship between the FOS and CMCs (who bring complaints on behalf of consumers in return for a share of any compensation that is obtained) is also concerning and it brings into question the fairness of the scheme as a whole. Because it is funded based on the number of complaints received, the FOS receives significant income as a result of complaints pursued through Claims Management Companies (CMCs) and the aggressive marketing strategies of CMCs. The FOS has also shown itself to be keen to apply case fees for just about anything submitted. This includes cases where the FOS decided that they did not have the jurisdiction to consider the matter but still sought to apply the case fee – it is difficult to think of another organisation that charges to tell you it can't do something. This bears the hallmarks of regulatory capture and iot requires further investigation by the FCA.

After the statutory scheme for PPI compensation (which provided CMCs with most of their revenue in recent years) closed in 2019, they have diversified into new markets. CMCs now intermediate 80% of complaints in consumer lending (compared with 30% across all complaints). Win or lose lenders have to currently pay £650 per case, which is set to increase £750. With the lender always picking up the cost, CMC's have weaponised the threat of case fees. Agree to the demand or face an automatic case fee.

This provides a strong incentive for firms to settle cases where redress can be made up to the case fee of £650. But at the same time, this acts in the interests of large firms who can absorb the costs involved, at the expense of smaller and mid-market firms. Considering that the average BNPL transaction (£65-£75) is a tenth of the current case fee, it would be absurd for these providers, many of whom are early stage venture-backed businesses (and loss-making by nature), to be subject to this regime for a pair of jeans. Although moves towards different charging for different types of complaints have been ruled out in the past due to fears of complexity, expanding the scope of the FOS to include low-value BNPL products suggests that it is high-time to revisit this question.

The FCA, under its competition objective, should undertake a review of the impact of FOS and FCA complaints rules on competition in retail financial services markets. It should also consider whether a single ombudsman service for the whole financial services industry, including consumers and small businesses, and covering complaints about CMCs, is still the right approach. It may well be that a separate alternative dispute mechanism is necessary for the BNPL market - similar to how the Business Banking Resolution Service (BBRS) caters for SME disputes.

Fair and Consistent Regime Treatment of People in Financial Difficulty

With the economy in difficulty and unemployment set to rise to 6.8% in Q4 2021 due to the pandemic, it is clear that the financial resilience of a growing number of individuals will be increasingly compromised. 25% of adults expect to struggle to make ends meet this year, with 16% expected to take on more debt. The FCA's 'Financial Lives Survey' highlights that, *"[w]hile the essential nature of vulnerability has not altered during the [covid-19] crisis, and nor have our fundamental characteristics of vulnerability, the scale and causes of vulnerability have changed."*

It is vital that consumers are clearly signposted throughout the customer journey to support available if they're struggling to make repayments. Firms' treatment of vulnerability is top of the FCA's list in light of the above so it is vital that BNPL services provide good outcomes for consumers throughout the customer's journey. Any debt collection methods practiced by BNPL providers should also be fair and consistent with the standards expected of other firms regulated by the FCA. Therefore, the existing forbearance regime should be applied to BNPL products when they are brought into scope, this will allow for a more consistent approach towards vulnerable consumers (CONC 7.10), as well as those in financial difficulty, to be applied across the entire lending sector.

Nevertheless, we have identified a number of areas that the FCA could make the current forbearance regime more humane and helpful for consumers in financial difficulty. The economic jolt caused by Covid-19 has shed light on its inadequacies and until the COVID-related payment holidays were announced, too many people's mental health situation was being adversely impacted by its unforgivingness. We have set out below our ideas for a simpler regime which has the potential to fix these whilst enhancing protections for consumers.

There are currently highly prescriptive actions that a lender must take when a customer is struggling to make repayments. This may involve issuing a modifying agreement, which is a cumbersome process that requires new documentation and a customer signature. The process should be streamlined so that borrowers can get the help they need in a prompt and transparent manner.

It also mandates the dispatch of a Notice of Sum In Arrears (NOSIA) if a payment is not paid by the due date. It does not take account of any arrangements the customer may have made with the lender, for example agreeing a period of breathing space. As a result of the prescribed language (in particular), customers are being sent inappropriate, confusing and unhelpful communications from lenders, who actually want to help. This too needs to be modernised.

Although the Government introduced secondary legislation last year to tone down the intimidating nature of the Default Notice, more improvements could be made if the content of these documents could be incorporated within FCA Handbook via rules and principles. This would enable changes to documentation to be made more quickly to ensure customers were receiving the right sorts of documents at the right time.

Nearly two thirds (64%) of respondents to Money and Mental Health's survey thought they would have recovered from mental health problems more quickly if they had been provided more support. Yet, of the nine firms approached by the FCA for its 'Financial Lives Survey', only two of the firms asked customers at the outset if they were experiencing physical or mental health issues, as well as circumstances that may affect their ability to manage their finances. With the prevalence of digital channels across the lending sector, this needs to be addressed.

Almost one in five (18%) people with mental health problems are in problem debt, and it would help if there was a consistent approach to BNPL late fees. This could be achieved by setting a centralised cap on the value of fees and specifying the minimum time that firms must give customers before imposing fees.

Nevertheless, a modern regime should penalise errors made by lenders in a manner that is proportionate to the harm they cause the borrower. Current provisions give rise to the automatic sanction of unenforceability where agreements are not executed properly or where information is incorrect, as well as a disentitlement sanction where a customer has no liability to pay interest or default sums during the period of non-compliance. This is often disproportionate to the error made. For example, a lender may wish to revise the statutory wording on default interest and fees in a NOSIA to make the position clearer to a customer (in line with Treating Customers Fairly) but is unable to do so without breaching the requirements. Unless a lender can argue that these changes do not affect the substance of the form of wording, the agreement will become unenforceable and the customer will have no liability to pay interest and default fees.

By contrast, the mortgage regime deals with this in a more balanced manner, with lenders being required to simply update the information provided. If the customer has suffered loss because of the breach of the Mortgage Handbook (MCOB), he or she is entitled to bring a claim for damages against the lender.

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